

**Amendments to the Drawings:**

Figure 5 has been amended to add reference identifier 500 as requested by the Examiner.

Attachment:   1 Replacement Sheet  
                  1 Annotated Sheet Showing Changes

## **REMARKS/ARGUMENTS**

Amendments were made to the specification to correct errors and to clarify the specification. No new matter has been added by any of the amendments to the specification.

Claims 1-20 are pending in the present application. Claims 1, 4-6, 10, 11, 14-16, 18 and 20 have been amended herewith. Reconsideration of the claims is respectfully requested.

### **I. Objection to Specification**

The Specification was objected to, with the Examiner noting that in the Cross Reference to Related Applications section, the Applicant left the serial number to the referenced application blank. Applicants have amended the Specification herewith to include the serial number for the referenced application.

Therefore, the objection to the Specification has been overcome.

### **II. Objection to Drawings**

The drawings were objected to as not containing reference identifier 500. Applicants are submitting concurrently herewith a replacement sheet for Figure 5 that includes reference identifier 500.

Therefore, the objection to the drawings has been overcome.

### **III. 35 U.S.C. § 101**

Claims 10-20 stand rejected under 35 U.S.C. § 101 as being directed towards non-statutory subject matter. This rejection is respectfully traversed.

With respect to Claim 10, the Examiner states that such claim is non-statutory because the claims lack necessary physical articles or objects to constitute a machine or a manufacture. Applicants respectfully disagree, as Claim 10 explicitly recites a data processing system (which is either a machine or a manufacture), and the data processing system comprises a bus system, a communications unit connected to the bus system, a memory connected to the bus system, and a processing unit – which are all, contrary to the Examiner’s assertion, physical articles or objects.

With respect to Claim 11 (and Claims 12-17), Applicants have amended such claim to explicitly recite a data processor, which is a physical article or object.

With respect to Claim 18 (and Claims 19-20), Applicants have amended such claim to track the MPEP-specified allowable claim language for computer software. As amended, Claim 18 recites that the computer readable medium is encoded with a computer program product that is operable in a data processing system for monitoring transactions for a set of known nodes in a network data processing

system, as specifically allowed for per the requirements of MPEP 706.03(a) and 2106. See, in particular, MPEP 2106(IV)(B)(1)(a) where it states:

“A claimed computer-readable medium encoded with a data structure defines structural and functional interrelationships between the data structure and the computer software and hardware components which permit the data structure's functionality to be realized, and is thus statutory. See *Lowry*, 32 F.3d at 1583-84, 32 USPQ2d at 1035.”

Accordingly, as Claim 18 expressly recites computer readable medium that is encoded with a computer program product that is operable in a data processing system for monitoring transactions for a set of known nodes in a network data processing system, it is shown that Claim 18 (and similarly for Claims 19 and 20) is directed to statutory subject matter, pursuant to both judicial case law and the USPTO's own MPEP rules. Thus, this amendment to Claim 18 provides a claim that fully complies with the MPEP requirements for statutory subject matter.

Therefore, the rejection of Claims 10-20 under 35 U.S.C. § 101 has been overcome.

#### **IV. 35 U.S.C. § 102, Anticipation**

Claims 1-6, 8-16 and 18-20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Nelson et al. (US Publication No.: 2003/0005092 A1), hereinafter “Nelson”. This rejection is respectfully traversed.

With respect to Claim 1, Applicants have amended such claim to include features previously recited in Claims 5-6, and further amended such claim to include certain features previously recited in Claim 4. It is urged that the cited Nelson reference does not describe any type of *identification with respect to transactions*, but instead is directed to a technique for *identifying physical hardware devices* (Nelson paragraphs [0002] and [0006]). In addition, Nelson does not provide any type of load balancing as a result of any transaction identification, but instead provides a user with a list of discovered devices (Nelson paragraphs [0011] and [0051]; Figure 2, block 216). The Nelson system is not directed to performance monitoring via transaction identification and subsequent analysis thereof, and resulting load-balancing that is done to mitigate transaction overload conditions, but instead is directed to a technique for identifying physical devices on a network to assist law enforcement personnel in recovery efforts associated with stolen property (Nelson paragraph [0002]). In addition, and contrary to the Examiner's assertion, Nelson's “range walk” discovery technique described in paragraphs [0006], [0011] and [0026] does not teach or otherwise describe a node load balancing technique but instead describes a technique for

locating and identifying devices. Nor is the Nelson “range walk” done *in response to analyzing identified transactions*, as the Nelson “range walk” is what is used as a precursor step prior to any type of device identification (Nelson block 204 of Figure 2, which performs the “range walk”, is done before any device identification that occurs in block 206 of Figure 2 since the devices have not yet been discovered/located – which is what the “range walk discovery technique” is all about). Restated, Nelson’s “range walk” is done to identify devices, and is not done in response to identifying anything (either identified transactions, as claimed, or any other type identification). In contrast, per the features of amended Claim 1, the selectively initiating of the load balancing process is done *in response to analyzing the identified transactions*. Accordingly, it is urged that the above described amendment to Claim 1 has overcome the present rejection of such claim under 35 U.S.C. § 102(b).

Applicants initially traverse the rejection of Claims 2-6, 8 and 9 for reasons given above with respect to Claim 1 (of which Claims 2-4, 8 and 9 depend upon).

Further with respect to Claims 5 and 6, Applicants have amended such claims to recite features pertaining to the non-intrusive manner in which the router data is provided without processor system intervention/request, as described in the Specification at page 13, line 15 – page 14, line 7 and page 16, line 26 – page 17, line 10. In contrast, per the teachings of the cited Nelson reference, data is explicitly requested by a discovery server using explicit network queries (Nelson page 3, paragraph [0026]). Thus, it is further urged that Claims 5 and 6 are not anticipated by the cited reference.

Further with respect to Claim 9, such claim recites “where the agent clears the address resolution protocol cache *each time data is sent to the data processing system*” (emphasis added). The Examiner states that this claimed feature is inherent in the teachings of Nelson since ARP cache entries eventually time-out. Applicants urge that due to the fact that the Nelson cache entries ‘time-out’, this actually establishes that the features recited in Claim 9 are not in fact inherent in the Nelson teachings. “Inherency . . . may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *In re Oelrich*, 666 F.2d 578, 581, 212 USPQ 323, 326 (CCPA 1981) (quoting *Hansgirg v. Kemmer*, 102 F.2d 212, 214, 40 USPQ 665, 667 (CCPA 1939)). “To establish inherency,” the Federal Circuit recently stated, “the extrinsic evidence ‘must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.’” *In re Robertson*, 169 F.3d 743, 745 [49 USPQ2d 1949] (Fed. Cir. 1999); see also *Continental Can Co. U.S.A., Inc. v. Monsanto Co.*, 948 F.2d 1264, 1268 [20 USPQ2d 1746] (Fed. Cir. 1991). It is respectfully submitted that since ARP cache entries ‘eventually time-out’, such ‘eventuality’ is not the same as what is recited in Claim 9 – *the agent clears the address resolution protocol cache each time data is sent to the data processing system*. Clearing the cache each time data is sent, as claimed, is very different from an eventual cache time-out, as alleged to be provided

by the cited Nelson reference. Thus, it has been shown that the features recited in Claim 9 are not in fact inherent in the teachings of Nelson, and Nelson teaches an alternative technique for clearing the cache, and therefore the extrinsic evidence does not make it clear that the missing descriptive matter (clearing the cache each time data is sent) is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Thus, it is urged that Claim 9 has been erroneously rejected under 35 USC § 102 as being inherent in the Nelson teachings.

Applicants traverse the rejection of Claims 10-20 for similar reasons to those given above with respect to Claim 1.

Therefore, the rejection of Claims 1-6, 8-16 and 18-20 under 35 U.S.C. § 102(b) has been overcome.

**V. 35 U.S.C. § 103, Obviousness**

Claims 7 and 17 stand rejected under 35 U.S.C. § 103 as being unpatentable over Nelson et al. (US Publication No.: 2003/0005092 A1) in view of Nelson et al. (US Patent No.: 5,835,720). This rejection is respectfully traversed for similar reasons to those given above with respect to Claim 1, as the newly cited US Patent 5,835,720 does not overcome the teachings deficiencies identified above with respect to Claim 1.

Therefore, the rejection of Claims 7 and 17 under 35 U.S.C. § 103 has been overcome.

**VI. Conclusion**

It is respectfully urged that the subject application is patentable over the cited references and is now in condition for allowance. The Examiner is invited to call the undersigned at the below-listed telephone number if in the opinion of the Examiner such a telephone conference would expedite or aid the prosecution and examination of this application.

DATE: August 1, 2007

Respectfully submitted,

/Wayne P. Bailey/

Wayne P. Bailey  
Reg. No. 34,289  
Yee & Associates, P.C.  
P.O. Box 802333  
Dallas, TX 75380  
(972) 385-8777  
Attorney for Applicants